Rosnah bt Kamarul Zaman & Ors v Extreme Chocolate Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S6–22–1144 OF 2008
T SELVENTHIRANATHAN JCA
11 FEBRUARY 2010

Civil Procedure — Injunction — Mareva injunction — Principles applicable — Action premised upon breach of settlement agreements — Whether there was real risk of assets being dissipated — Whether order ought to be granted

The first defendant and the plaintiffs had entered into settlement agreements. Vide the said agreements the first defendant undertook to pay each of the plaintiff specified sums of money. These settlement agreements were executed consequential upon the first defendant's failure to pay back each of the plaintiffs certain guaranteed returns and profits in respect of investments made. The first defendant had breached the settlement agreements and accordingly, the plaintiffs filed this action against them. The plaintiffs also brought in the second defendant as a party in this action as she had guaranteed the undertaking by the first defendant under the settlement agreements. Subsequently, the plaintiffs filed the application in encl (4) for a Mareva injunction against the defendants.

Held, allowing the plaintiffs' application:

(1) There was clear evidence that the first defendant had breached the settlement agreements and the second defendant had breached the guarantee which she gave (see para 2(a)).

(2) Not only was there 'solid evidence' to support the application of the plaintiffs in encl (4) to satisfy the test in *Biasamas Sdn Bhd & Ors v Kan Yan Heng & Anor* [1998] 4 MLJ 1; [1998] 4 CLJ 754 but that such evidence was overwhelming as set out in this judgment. There was therefore no conceivable reason why this court should not make an order in terms of the plaintiffs' application in encl (4) as the defendants had failed to show that the justice of the case necessitated ruling in their favour (see paras 4–5).

[Bahasa Malaysia summary

Defendan pertama dan plaintif-plaintif telah menandatangani perjanjian-perjanjian penyelesaian. Menerusi perjanjian-perjanjian tersebut defendan pertama mengaku janji membayar setiap plaintif sejumlah wang

yang ditentukan. Perjanjian-perjanjian penyelesaian tersebut telah dimasuki akibat kegagalan defendan pertama membayar balik setiap plaintif pulangan terjamin tertentu dan keuntungan berkaitan dengan pelaburan-pelaburan yang dibuat. Defendan pertama telah memungkiri perjanjian-perjanjian penyelesaian tersebut dan oleh sebab itu, plaintif-plaintif memfailkan tindakan ini terhadap mereka. Plaintif juga memasukkan defendan kedua sebagai pihak dalam tindakan ini kerana beliau telah menjamin akujanji yang diberikan oleh defendan pertama di bawah perjanjian-perjanjian penyelesaian. Selanjutnya, plaintif-plaintif memfailkan permohonan dalam kandungan (4) untuk injunksi Mareva terhadap defendan-defendan.

Diputuskan, membenarkan permohonan plaintif-plaintif:

(1) Terdapat bukti jelas bahawa defendan pertama telah memungkiri perjanjian-perjanjian penyelesaian dan defendan kedua telah memungkiri jaminan yang dia berikan (lihat perenggan 2(a)).

(2) Bukan sahaja wujud 'bukti kukuh' menyokong permohonan plaintif-plaintif dalam kandungan (4) untuk memenuhi ujian dalam *Biasamas Sdn Bhd & Ors v Kan Yan Heng & Anor* [1998] 4 MLJ 1; [1998] 4 CLJ 754 tetapi bukti tersebut adalah kukuh seperti yang dinyatakan dalam penghakiman ini. Oleh itu tidak ada sebarang alasan mengapa mahkamah ini tidak patut membuat perintah seperti yang dipohon oleh plaintif dalam kandungan (4) kerana defendan-defendan telah gagal menunjukkan bahawa keadilan kes sewajarnya memihak kepada mereka (lihat perenggan 4–5).]

Notes

For cases on Mareva injunction, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3805–3891.

Cases referred to

Aspatra Sdn Bhd & 21 Ors v Bank Bumiputra Malaysia Bhd & Anor [1988] 1 MLJ 97, SC (refd)

Biasamas Sdn Bhd & Ors v Kan Yan Heng & Anor [1998] 4 MLJ 1; [1998] 4 CLJ 754, CA (folld)

S & F International Limited v Trans-Con Engineering Sdn Bhd [1985] 1 MLJ 62, FC (refd)

Shahriza Zalina Abdul Shukor (Shahriza Shukor & Co) for the plaintiffs.

Alvin Mohamed bin Ata Mohamed (Bhadarul Baharain & Partners) for the defendants.

T Selventhiranathan JCA:

[1] By settlement agreements ('the SAs') the first defendant undertook to pay

each of the plaintiffs specified sums of money by 31 August 2008. These SAs were executed consequential upon the first defendant's failure to pay back each of the plaintiffs certain guaranteed returns and profits in respect of investments made. The first defendant breached the SAs and the plaintiffs filed this action against it. The plaintiffs also brought in the second defendant as a party in this action as she had guaranteed the undertaking by the first defendant under the SAs.

[2] The plaintiffs then filed the application in encl (4) for a Mareva injunction against the defendants. In granted an order in terms of encl (4) for the following reasons:

(a) there was clear evidence that the first defendant had breached the SAs and the second defendant had breached the guarantee which she gave;

(b) the defendants have assets in the jurisdiction as evidenced by the following:

(i) the first defendant is a company incorporated in Malaysia whose object is to carry out business in chocolate and confectionery general trading and investment holdings;

(ii) the second defendant is a Malaysian citizen and a director and major shareholder of the first defendant. She is also a director and major shareholder of Extreme Success Sdn Bhd (whose object is to carry out business in processing and selling cookies and chocolate) and Extreme Food Services Sdn Bhd (whose object is to carry out business in general trading, property and construction and investment holdings); and

(iii) the defendants should have bank accounts, assets as well as vehicles registered in their names.

(c) There is a real risk of dissipation of the assets as the following conduct of the defendants shows their lack of probity:

(i) giving written assurances and guarantees on the returns on investments (ie guaranteed returns on the investments and profits) made by each of the plaintiffs to induce the plaintiffs to invest;

(ii) despite giving the written assurances, the first defendant failed to pay not only the guaranteed returns on the investments but also the profits;

(iii) the first defendant issued cheques from its Public Bank account with full knowledge that the account had been closed;

(iv) the first defendant caused Extreme Success Sdn Bhd (wherein the second defendant is a director and major shareholder) to issue

cheques out of Extreme Success Sdn Bhd's account at EON Bank, failing thereafter to ensure that the cheques were honoured upon presentment for payment;

(v) the first defendant also caused Extreme Food Services Sdn Bhd (wherein the second defendant is a director and major shareholder) to issue a cheque out of Extreme Food Services Sdn Bhd's account at Bank Muamalat, and thereafter issued an instruction to Bank Muamalat to stop payment on the cheque;

(vi) entering into the SAs, all dated 6 March 2008 with each of the plaintiffs where the first defendant agreed to pay back each of the plaintiffs a determinable amount by 31 August 2008, without any intention of honouring the same; and

(vii) giving the guarantee and indemnity to pay, all dated 10 March 2008 to each of the plaintiffs where the second defendant agreed to pay back each of the plaintiffs a determinable amount in the event the first defendant failed to pay the plaintiffs back on 31 August 2008, with the intention of not honouring the promises to pay.

(d) the previous actions of the defendants clearly demonstrates that their probity be relied upon;

(e) an inference could be drawn from the conduct of the defendants that there is a real risk of the defendants' assets being dissipated;

(f) based on the above, it can be concluded that:

(i) the plaintiffs have a good arguable case;

(ii) that the defendants have assets within the jurisdiction; and

(iii) that there is a real risk of dissipation of these assets so as to render them unavailable or untraceable to satisfy any judgment the plaintiffs may likely obtain.

see *Aspatra Sdn Bhd & 21 Ors v Bank Bumiputra Malaysia Bhd & Anor* [1988] 1 MLJ 97; *S & F International Limited v Trans-Con Engineering Sdn Bhd* [1985] 1 MLJ 62.

[3] The defendants' contention 'that there is no shred of facts and/or evidence to demonstrate that the defendants will dissipate their assets' is demolished by their own admission in their submissions as follows:

... The plaintiffs' single allegation to support their contention of dissipation *is based on the fact that the defendants had failed to fulfil their contractual obligations, made payments from closed bank accounts and bank accounts of third parties*.

A In essence the allegations made by the plaintiffs only demonstrates that there is a delay in (the) making of payments by the defendants. It is submitted that these allegations are insufficient to establish the 'solid evidence' test laid out in the Court Appeal case of *Biasamas Sdn Bhd & Ors v Kan Yan Heng & Anor* [1998] 4 MLJ 1; [1998] 4 CLJ 754.

B (Emphasis added.)

[4] With respect, I am of the view that not only is there 'solid evidence' to support the application of the plaintiffs in encl (4) to satisfy the test in *Biasamas Sdn Bhd & Ors v Kan Yan Heng & Anor* [1998] 4 MLJ 1; [1998] 4 CLJ 754 but C that such evidence is overwhelming as set out in this judgment.

[5] There was therefore no conceivable reason why I should not make an order in terms of the plaintiffs' application in encl (4) as the defendants had D failed to show that the justice of the case necessitated my ruling in their favour.

Plaintiffs' application allowed.

Reported by Ashgar Ali Ali Mohamed

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